SERVED: June 3, 2005

NTSB Order No. EA-5160

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 31st day of May, 2005

MARION C. BLAKEY, Administrator, Federal Aviation Administration, Complainant, v. PAUL RICHARD ORDINI, Respondent.	Docket SE-17055

OPINION AND ORDER

Respondent has appealed from an order granting the Administrator's motion to dismiss respondent's appeal as untimely, issued by Administrative Law Judge William A. Pope, II, on May 26, 2004.[1] We deny the appeal and affirm the dismissal.

Background

On January 13, 2004, the Administrator issued an order suspending respondent's commercial pilot certificate for 270 days based on allegations that he operated an airplane in low

[1] A copy of the order is attached.

aerobatic flight over a congested area or open air assembly, and unauthorized entry into Class B, C, D, or E airspace, in violation of 14 C.F.R. sections 91.119(a), (b) and (c); 91.13(a); and 91.303(a), (c), (d), and (e). The Administrator served the January 13 order by certified mail, return receipt requested. The post office delivered three notices to respondent's address of record informing him he had a certified letter to pick up. The notices were delivered on January 16, January 21, and January 31. When the certified letter was not picked up, the post office returned it to the FAA as unclaimed. On February 6, 2004, the FAA received the returned unclaimed letter and resent it to respondent's address of record by regular first-class mail. Respondent apparently received it, as he filed his notice of appeal 19 days later, on February 25, 2004.

On March 8, 2004, the Administrator filed a motion to dismiss respondent's appeal because respondent's appeal was not filed within the required 20-day period following service of the order.[2] The Administrator argued that the January 13, 2004, certified mailing constituted constructive service and, therefore, respondent's appeal was due within 20 days of this mailing, or by February 2, 2004. Respondent opposed the motion to dismiss, asserting that he was away from home when the notices informing him he had certified mail were delivered to his address of record. He pointed out that he appealed the order within 20

[2] 49 C.F.R. 821.30(a) states that an appeal must be filed with the Board within 20 days after the date on which the Administrator's order was served on the respondent.

days of the February 6 regular first-class mailing and argued that this should be considered a timely appeal.

The law judge granted the motion to dismiss, finding that the certified mailing that was returned to the FAA unclaimed constituted constructive service of the order as of January 13, 2004, and that respondent had not shown good cause for his failure to file an appeal within the prescribed 20-day period following service. He stated, "respondent does not explain where he was, when he left, or when he returned….Further he offers no explanation for why he did not respond with due diligence to the three notices left by the postal service…whenever it was that he did return to his address of record from the business trip, as he claims." The law judge noted that respondent did not specifically deny that he found certified mail notices with his mail when he returned to his residence. The law judge concluded that

> Respondent has not shown that he acted with due diligence when he did not contact the postal service to claim his certified mail pursuant to the notices delivered to his address of record, nor did he contact the FAA to determine the contents of the certified letter he did not claim at the U.S. Post Office. Rather, it appears that he simply ignored the postal service's three notices that it was holding certified mail for him.

On appeal, respondent asserts that he was absent from his residence in connection with his employment as an aerobatic pilot when the three notices were delivered by the postal service, and that by the time he returned, the post office, "no longer held the critical letter for delivery." Respondent argues that he has

rebutted any presumption that he did not collect his certified mail by asserting that he was out of town when the notices were delivered. He also points out that by the time the FAA remailed the order by regular first-class mail, the 20-day period following the earlier certified mailing had already expired. Therefore, respondent asserts, if the earlier certified mailing is considered the date of constructive service, "the subsequent mailing, rather than being the supplemental means of service it was intended, becomes a cruel taunt, for the Respondent by that time is precluded from appeal."

The Administrator, in her reply brief, states that respondent was on notice of the pending enforcement action because he had discussed the underlying incident with FAA inspectors on September 24, 2003, and because prior to issuing the order of suspension, the FAA sent respondent a letter of investigation on September 30 and a notice of proposed certificate action on November 24. The Administrator also pointed out that respondent had recently settled another enforcement matter and, therefore, he should be familiar with the FAA's legal enforcement process. The Administrator asserts that the law judge properly found that respondent was constructively served with the order of suspension on January 13, 2004. The Administrator argues that respondent's asserted absence from his address when the notices of certified mail were delivered, "only serves to admit that he, in fact, did neglect to collect his certified mail." (Administrator's brief at 6-7, emphasis in

original.)

Discussion and disposition of the case

The applicable law governing service of FAA orders, 49 U.S.C. § 46103(b), which is part of the FAA's enabling legislation, clearly states that service of notice and process in enforcement proceedings may be made by certified or registered mail, and that, "the date of service made by certified or registered mail is the date of mailing." The cases cited by the law judge and the parties are from a line of Board cases holding that determination of the service date of FAA orders is to be evaluated under principles of general law.[3] However, this approach was superceded by the recognition, in Administrator v. Corrigan, NTSB Order No. EA-4806 (1999), that section 46103(b) governs this issue.[4] Under that statutory provision, and our post-Corrigan case law, we have no choice but to find that the Administrator's order of suspension was served on January 13, 2004, and, therefore, to uphold the law judge's dismissal of the appeal as untimely.

Respondent's suggestion that the FAA should have used regular mail as a supplemental means of service is similar to an argument that we rejected in Administrator v. Tu, NTSB Order No.

[3] See, e.g., Administrator v. Noroozi, NTSB Order No. EA-4284 (1994), and cases cited therein.

[4] See also Administrator v. Carlos, NTSB Order No. EA-4936 (2002); and Administrator v. Reid, NTSB Order No. EA-5150 (2005), where we recognized this statutory provision as controlling when service is made by certified or registered mail.

EA-5117 (2004), appeal filed, December 8, 2004 (9th Cir. 04-76454). In that case, we held that the Administrator was not obligated to serve the respondent in multiple ways and that certified mail returned unclaimed constituted constructive service under our rules.

The question of whether or when respondent received the notices from the post office need not be analyzed in order to find that there was proper service, under section 46103(b). Nonetheless, we note that respondent failed to respond to the three notices from the post office relating to the order of suspension, and he previously failed to respond to three similar notices from the post office relating to the notice of proposed certificate action. However, he apparently received both documents when they were resent by regular mail.

Respondent asserts in his brief[5] he was away from home when the post office notices pertaining to the order of suspension arrived. However, a pilot who is absent from his address of record for an extended period without arranging for his mail to be forwarded or picked up – especially one involved in a pending enforcement matter – runs a risk of missing deadlines set forth in documents sent to him during that time. Respondent has not clarified exactly when he arrived home, or explained why he did not take action to find out what the certified mail was as soon as he did arrive home and find the three notices.[6] Rather, it

[5] Respondent has not submitted any sworn affidavits.

[6] Nor, as the law judge noted, has respondent denied that he

appears he did nothing until the document reached him on February 6 by regular mail.[7] We note that he should easily have recognized – based on the three notices of certified mail that were delivered to his home during January in his absence, and the January 13, 2004, date along with the words, "CERTIFIED MAIL RETURN RECEIPT REQUESTED," on the face of the re-mailed document – that the FAA had originally mailed this document on January 13. However, he still did not take action to appeal from the order until 19 days later. This delay indicates a lack of diligence.

In sum, respondent has failed to show good cause for his untimely appeal from the January 13, 2004, order of suspension.

Comment on FAA practices relating to service of orders

Although the parties have not directly raised or briefed the issues discussed below, this case provides us with an opportunity to make some general observations about the need for improvement in FAA's practices and policies concerning service of orders in enforcement matters appealable to the Board. The format and language of the order of suspension in this case was similar to others we have seen in FAA enforcement cases, in that it did not clearly indicate what date the order was served. The statement of appeal rights at the end stated, "[y]ou may appeal from this Order within twenty (20) days from the date it is served by

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received these notices.

[7] In his opposition to the Administrator's motion to dismiss, respondent stated that he received the order on February

filing a notice of appeal [with the Board]." However, nowhere on the order was there a clear indication to the recipient of what date it was "served." While the term "served" is understood to mean "mailed" by the cognoscenti who are familiar with FAA enforcement cases, in other legal contexts this term can be understood to mean "received."[8]

Not only is the term "served" not defined, directly or indirectly, anywhere in the order of suspension, but the order also lacks a certificate of service, which would have helped to clarify that the FAA regards the date of mailing as the date of service. We note that some of the FAA orders we have reviewed do specify the service date in one or more of these ways,[9] and we commend the FAA for the clarity of those orders. However, the FAA's practices are inconsistent among, and even within, its regions. Thus, there is clearly room for further improvement.[10]

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6, 2004.

[8] See, for example, the definition of "service of process" in *Blacks Law Dictionary, Fifth Edition,* which states that, "[t]he service of writs, summonses, etc., signifies the delivering to or leaving them with the party to whom or with whom they ought to be delivered or left; and, when they are so delivered, they are then said to have been served." Similarly, *The American Heritage Dictionary of the English Language, Fourth Edition*, includes the following definition of "serve": "*Law.* To deliver or present (a writ or summons); to present such a writ to."

[9] In some cases, the appeal rights section at the end of an order provides the exact date of service (i.e., the date the order was mailed), states that the date of service, "appears on the face of this order," or states that service is considered to be the date of mailing. See, e.g., Administrator v. Carson and Richter, NTSB Order No. EA-3905 (1993).

[10] Again, we emphasize that the respondent in this case has

This lack of clarity regarding the service date is especially troubling in light of our exhortation to the FAA in Administrator v. Decuir, NTSB Order No. EA-5048 (2003), where we stated, "the confusion that precipitated the late appeal [in that case] could have been eliminated had the Administrator's order reflected the actual date by which the appeal needed to be filed." We recognize that there may have been valid reasons why the FAA chose not to follow our suggestion to calculate the due date for appealing each individual order, as that practice could carry its own risks of confusion, should the calculation be incorrect. However, even if the actual date is not specified, the due date of an appeal could be clarified by defining the service date as the date that appears on the face of the order or as the date of mailing. As previously noted, the FAA has employed both of these techniques, but inconsistently. Finally, we note that our own practice and that of our law judges is to indicate the service date on the face of the document, preceded by the word "SERVED." (See, for example, the upper right hand corner on the first page of this opinion and order.)

In conclusion, we think many of the orders issued by the FAA still create a significant potential for confusion regarding determination of the appeal-filing deadlines. This potential

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not advanced these arguments. In fact, by arguing that his appeal period should run from the date of the February 6 remailing rather than from the January 13 date of the certified mailing, respondent appears to concede that the time for appealing runs from the date of mailing and not from the date of receipt.

confusion could be reduced or eliminated by more careful attention to the format and wording of these orders.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal from the law judge's order is denied;

2. The law judge's order dismissing respondent's appeal from the order of suspension is affirmed; and

3. The 270-day suspension of respondent's pilot certificate shall begin 30 days after the service date indicated on this opinion and order.[11]

ROSENKER, Acting Chairman, and ENGLEMAN CONNERS, HEALING, and HERSMAN, Members of the Board, concurred in the above opinion and order. Member HEALING submitted the following concurring statement, in which Member HERSMAN joined.

[11] For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 CFR 61.19(g).

Member Healing, concurring:

This case once again illustrates how the FAA's reliance on a flawed system of delivery can cause confusion and potentially unwarranted damage to an airman's livelihood. In at least 3 previous cases, the FAA's use of mail services available in the Postal system left questions as to when the intended recipient actually received an important notice[12] and when a response might actually be due,[13] and whether regular mail is preferable to certified mail.[14]

As I stated in my dissenting statement in Administrator vs. Tu, two serious mail flaws are evident. First, FAA uses a

[12] In Administrator vs. Duchek, NTSB Order No. EA-5040 (2003), the FAA approved a process that used regular mail to notify a small business owner of a random drug test requirement. Lacking a Return Receipt, there was potential to question the certainty of delivery and time of receipt. Although in the Duchek case it was clear that the mail had been received, there was no certainty as to date/time when that occurred, and there was no specific date/time by which the important drug test had to be performed. Because of the lack of certainty, the Board said, "Without the latter specificity, the rules are open to uncertainty in their application and an element of this important program could be the subject of time consuming and unnecessary litigation." The United States Court of Appeals, in vacating the NTSB's decision against Duchek, along with other considerations paid significant attention to the uncertainty as to date/time when notification of a requirement of drug testing was actually delivered, and lack of a date/time certain for when such testing was to be accomplished.

[13] In Administrator vs. Decuir, NTSB Order No. EA-5048 (2003), the respondent's appeal was filed 9 days after his receipt of Certified Mail that instructed him to appeal to the NTSB "within 10 days of service of the order." What was not clear to the respondent, which the Board pointed out to the FAA in its decision, was that the "official" interpretation of "service" is the date on which the order is placed in the postal system as Certified Mail, and NOT the date of actual receipt by the respondent. The Board urged "the Administrator whenever practicable to advise recipients of orders of the date by which an appeal to the Board must be submitted," which would eliminate misinterpretation of the "date of service."

[14] In Administrator vs. Tu, NTSB Order No. EA-5117 (2004), the respondent argued that he would not have filed late if the orders of suspension had been served on him by both certified and first-class mail, instead of just by certified mail, since first-class mail would have been forwarded to him while he was away on travel.

potentially ineffective method of notification. While we do not know the condition of the Postal Service forms left at Mr. Ordini's residence, past experience indicates the weakness of relying on individual penmanship of those filling out the form to produce a readable, understandable document.

The second flaw is that the 20-day window in which to file an appeal begins when the FAA puts the Notification order into the Certified Mail system. The FAA does not have the ability to know exactly when or in what condition their order will arrive into the hands of the intended recipient; thus they cannot assure the amount of time that will be available to appeal.

It is unfortunate that we have to dismiss cases on procedural grounds for late appeals. If we had in place a system of delivery in which we had confidence and assurance that recipients have been actually and properly served, it would make these decisions much easier and remove the ambiguity that continually clouds these appeals. I would urge the FAA to examine its process and seek solutions to repair this flawed notification delivery system.